IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 197 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DINESHKUMAR CHIMANLAL SHUKLA
FOOD INSPECTOR OF VADODARA

Versus

GIRDHARILAL KISHORILAL SHAH
PROP. OF DILIP PROVISION STORE

Appearance:
MR PRANAV G. DESAI for the Appellant
NOTICE SERVED on Respondent No. 1
MR K.G. YAGNIK for Respondent No. 2
MR D.P. JOSHI A.P.P. for Respondent No. 3

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 01/11/2001

ORAL JUDGEMENT

The appellant i.e. Mr.D.C.Shukla, Food Inspector of Vadodara Municipal Corporation has challenged the

legality of judgement dated October 12, 1990 delivered by the learned Judicial Magistrate (F.C.), Vadodara in Criminal Case No.6170 of 1982 by which the respondent Nos.1 and 2 are acquitted of the offences punishable under Sections 7 and 16 of the Prevention of Food Adulteration Act, 1954 ("the Act" for short).

2. The appellant is appointed as a Food Inspector, Vadodara. The respondent No.1 is running a grocery shop in the name of Dilip Provision Store, Nr.Gorva Bus Stand, Vadodara which is within the limits of Vadodara Municipal Corporation, whereas the respondent No.2 is running a shop in the name of Mahalaxmi Masala Bhandar at Marchawala ni Gali, Fathepura, Vadodara and deals in spices such as chilly powder, turmeric powder, etc. on wholesale basis. On June 08, 1982, the appellant had visited the shop of the respondent No.1 and found that the respondent No.1 was selling chilly powder. The appellant had called a panch witness and in the presence of panch witness, the appellant had purchased 600 grms. of chilly powder from the respondent No.1 for the purpose of analysis and paid Rs.7.20 being the price of the same. The sample was divided into three equal parts and taken in clean dry-bottles. After following the procedure of sealing, labelling, wrapping, etc. one of the sample bottles was sent for analysis. The report of the Public Analyst was received which indicated that the sample of chilly powder was adulterated. At the time when the sample of chilly powder was purchased by the appellant for analysis, the respondent No.1 had declared orally before the appellant No.1 that he had purchased chilly powder from the respondent No.2, and therefore, necessary notice was issued to the respondent No.2 also. The appellant had obtained written consent as required by Section 20 of the Act and instituted prosecution against the respondent Nos.1 and 2 in the Court of learned Judicial Magistrate (F.C.), Vadodara. The respondent No.1 had made an application to the Court to get the sample analysed by the Central Food Laboratory. The said application was accepted by the Court and one of the sample bottles was sent to the Central Food Laboratory for analysis. The report of the Central Food Laboratory indicated that the sample analysed was adulterated. The evidence of the appellant was recorded before the Court and on being satisfied that there was a prima facie case against the respondent Nos.1 and 2, the learned Magistrate had framed charge against the respondent Nos.1 and 2 of the offences punishable under Sections 7 and 16 of the Act. The charge was read over and explained to the respondent Nos.1 and 2 who pleaded not guilty to the same and claimed to be tried. Further evidence of the complainant was thereafter recorded and the appellant was

permitted to be cross-examined by the learned counsel for the respondent Nos.1 and 2. The appellant had also examined panch witness in support of his case against the respondent Nos.1 and 2 but the panch witness had turned hostile. The appellant had produced documentary evidence such as notice given to the respondent No.1 while effecting purchase of chilly powder at Exh.18, receipt issued by the respondent No.1 for having received the price of the sample sold at Exh.19, panchnama prepared by the appellant at the time of taking sample at Exh.24, etc., in support of his case against the respondent Nos.1 and 2. After recording of evidence of the appellant and his witnesses was over, the learned Magistrate explained to the respondent Nos.1 and 2 the circumstances appearing against them in the evidence of the prosecution and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. The respondent No.1 examined himself on oath at Exh.88 and produced Bills, etc. to establish his defence that he had purchased chilly powder from the respondent No.2.

3. On appreciation of evidence led by the parties, the learned Magistrate held that it was not proved by the appellant that he had taken samples in clean dry-bottles. The learned Magistrate noticed that the evidence of the appellant did not show that the sample of chilly powder purchased by the appellant was homogeneous and representative in character. The learned Magistrate deduced that it was not established by the appellant that he had maintained a record of inspection made by him of the shop of the respondent No.1 nor record indicating action taken by him in performance of his duties, and therefore, his evidence was not reliable. The learned Magistrate found that the Local (Health) Authority which had granted sanction to prosecute had not applied mind to the relevant facts of the case, and therefore, written consent to prosecute the respondent Nos.1 and 2 was bad in law. In view of the above referred to conclusions, the learned Magistrate has acquitted the respondent Nos.1 and 2 by judgement dated October 12, 1990 giving rise to the present appeal.

4. Initially, the appellant was represented by late learned Sr. Counsel Shri G.N.Desai and on sad demise of Shri Desai, notice was issued to the appellant calling upon him either to engage another advocate or to appear personally in the Court for arguing the appeal. On service of notice, the appellant has engaged Shri Pranav G. Desai and though the notice is served, the respondent No.1 has not engaged another advocate nor remained present before the Court for arguing the appeal.

5. Heard the learned counsel for the appellant and the learned counsel for the respondent No.2 as well as Shri D.P.Joshi, learned A.P.P. for the State of Gujarat. The view taken by the learned Magistrate that the sanctioning authority had granted consent to prosecute without application of mind, and therefore, sanction to prosecute is bad in law is totally erroneous. The evidence of the appellant indicates that the analysis report as well as other pertinent materials was placed before the sanctioning authority and after going through the material, sanction was granted for instituting the prosecution. At that stage, it was not for the sanctioning authority to weigh pros and cons and then to find whether the case could end in conviction or acquittal or the adulteration was abnormal or marginal etc. The view taken by the learned Magistrate that the sanction to prosecute is without application of mind, and therefore, prosecution is vitiated cannot be upheld in view of the decision of the Supreme Court in Suresh H. Rajput and others Vs.Bhartiben Pravinbhai Soni and others (1996) 7 SCC 199. In the reported decision, the Supreme Court has held that sanction granted by the Local (Health) Authority after going through the report of the Public Analyst and other relevant materials cannot be invalidated on the ground of non-application of mind because at that stage, sanctioning authority is not required to weigh pros and cons and then to find whether the case could end in conviction or acquittal. In view of the principles laid down by the Supreme Court in the above quoted decision, the finding recorded by the learned Magistrate that sanction to prosecute is bad in law is totally erroneous and is hereby set aside.

The view taken by the learned Magistrate that the sample of chilly powder which was taken for the purpose of analysis was not homogenous or representative in character and therefore, the respondent Nos.1 and 2 are entitled to acquittal is also based on erroneous construction of the relevant provisions of the Act. Section 11 of the Act which prescribes procedure and manner to be followed while taking sample for analysis no where stipulates that the sample taken should homogeneous and representative in character. The five judge Constitution Bench of the Supreme Court in State of Kerala Vs. Alasserry Mohammed (1978) 2 SCC 386 = AIR 1978 SC 933 has specifically considered this point and held in para 13 of the reported decision that "If the food sold to the Inspector is proved to be adulterated, it is immaterial whether the sample purchased by him is a representative sample or not of the entire stock in

possession of the person. A person who stores or sells such sample is liable to be punished under Section 16(1)(a)(i) of the Act." In view of the authoritative pronouncement of law by the Supreme Court, the finding that the sample taken was not representative in character and therefore, the respondent Nos.1 and 2 are entitled to acquittal being erroneous in law is hereby set aside.

6. However, the evidence of the appellant does not indicate that he had taken samples in clean dry-bottles. In cross-examination by the respondent No.1, the appellant has in terms admitted that he had not verified whether the instruments used for the purpose of taking samples were clean and dry. The appellant has further admitted that he had not cleaned the bottles in presence of the respondent No.1. His evidence further shows that the taking of sample etc. was done by his peon who is not examined in the case as one of the witnesses. Thus, the evidence of the appellant does not establish chain which would indicate that sample of chilly powder for the purpose of analysis was taken in clean dry-bottles. The contention that presumption to the effect that the samples were taken in clean dry-bottles should be raised cannot be accepted in view of the positive evidence on record. The finding recorded by the learned Magistrate that the appellant had committed breach of Rule 14 of the Prevention of Food Adulteration Rules, 1955 being eminently just is hereby confirmed.

7. Further Rule 9(e) of the Prevention of Food Adulteration Rules, 1955 requires that a Food Inspector has to maintain a record of all inspections made and actions taken by him, in performance of his duties including taking of samples etc. Though demanded by the defence, the appellant could not establish before the Court by production of Inspection Book that he had maintained record as required by Rule 9(e) of the Prevention of Food Adulteration Rules, 1955, and therefore, I am of the opinion that the learned Magistrate did not commit any error in placing reliance on the evidence of the Food Inspector which does not stand corroborated in material particulars by other evidence on record. As observed earlier, the panch witness had turned hostile and his evidence was of little help to the appellant. Though erroneous findings of law recorded by the learned Magistrate are set aside the acquittal will have to be confirmed on other grounds which are borne out from the record of the case. This is an acquittal appeal in which Court would slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and

strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal more particularly when the evidence has not inspired confidence of the learned Magistrate who had opportunity to observe demeanour of the witnesses. As I am in general agreement with the view expressed by the learned Magistrate, I do not think it necessary either to reiterate the evidence of prosecution witness or to restate the reasons for acquittal given by the learned Magistrate and in my view, expression of general agreement with the view taken by the learned Magistrate would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the case of (1) Girija Nandini Devi and Others Vs. B.N. Chaudhary, AIR 1967 SC 1124 and (2) State of Karnataka Vs. Hema Reddy and another, AIR 1981 SC 1417. On overall appreciation of evidence, I am satisfied with the order of acquittal of the respondent Nos.1 and 2 is well founded. The learned A.P.P. has failed to convince me to take the view contrary to the one already taken by the learned Magistrate, and therefore, the appeal is liable to be dismissed.

For the forgoing reasons, the appeal fails and is dismissed.

(J.M.Panchal, J)

'Bhavesh'